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No. 94-1705

In The
**Supreme Court of the United States**
October Term, 1994

ASTON A. BEADLE

*Petitioner,*

v.

CITY OF TAMPA, FLORIDA, ET AL.

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

# MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Agudath Israel of America respectfully moves for leave to file the accompanying brief amicus curiae in the above-captioned case.

Founded 73 years ago, Agudath Israel of America is a national Orthodox Jewish organization with a deep and

abiding interest in the laws that protect religiously-observant Americans in the workplace, and in the particular application of those laws to the rights of Sabbath-observers. Sabbath observance is a fundamental tenet of the Jewish faith, and Orthodox Jews adhere strictly to the biblical proscriptions that forbid them to work on the Sabbath day. As an advocate for its constituents' rights and interests, Agudath Israel has sought to safeguard and strengthen the scope of federal, state and local laws that protect Sabbath-observers on the job. As a community liaison, Agudath Israel occasionally mediates in workplace disputes and in efforts to reach agreement on job schedules and on other arrangements that -- as required by Title VII of the Civil Rights Act of 1964 -- "reasonably accommodate" the religious requirements of Sabbath observers without causing "undue hardship" to the commercial interests of their employers.

Agudath Israel is of the view that Title VII protections for religious practitioners, as interpreted by the courts, have proven inadequate. Because this case would afford the Court an opportunity to clarify and strengthen an employer's obligations under Title VII, Agudath Israel, and the constituency it represents, have an important stake in the petition for certiorari.

Agudath Israel believes that it would bring to this case a perspective not currently before the Court. Its proposed *amicus curiae* brief advances an argument that extends beyond those offered in petitioner's brief -- *i.e.*, that the phrase "undue hardship" in Title VII should be accorded the same meaning it has under the Americans with Disabilities Act, excusing an employer from reasonable

accommodation only upon a showing of "significant difficulty or expense." Agudath Israel believes there are constitutional dimensions to this argument, as detailed in its proposed *amicus* brief, and that they deserve full consideration by this Court.

Counsel for petitioner has responded affirmatively to Agudath Israel's request for consent to file an amicus brief. Counsel for respondent, however, has withheld such consent, indicating to counsel for Agudath Israel in a telephone conversation on May 17, 1995 that he neither consents nor objects to Agudath Israel's filing of an amicus brief. Hence the need for this motion.

For the reasons stated above, Agudath Israel respectfully urges the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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# BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish movement. As an advocate for Orthodox Jewish interests, Agudath Israel plays an active role in helping promote and safeguard the rights of observant Jews and other religious minorities.

One of the most important of those rights is the right to seek and hold employment without discrimination on the basis of religious identity or practice -- a right embodied in federal statutory law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and directly implicated in this case. Sadly, as Agudath Israel can attest through its constituents' personal experiences, religious discrimination in the workplace -- especially discrimination against Sabbath observers -- continues to be a serious problem in our society; and it has become increasingly evident, as the decision below illustrates, that Title VII has failed to realize its promise as a legal bulwark against such discrimination.

In Agudath Israel's view, a large part of the reason for that failure is this Court's holding in *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977). Under Title VII, an employer is obliged to make reasonable accommodation to an employee's "religion," defined to include "all aspects of religious observance and practice, as well as belief," unless the employer shows that such accommodation would cause "undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). The statute provides no guidance to help determine whether any given hardship is "undue." Such guidance was provided, instead, by *Hardison*: the Court held that an employer can demonstrate "undue hardship", and thereby avoid Title VII's mandate of reasonable accommodation of religion, simply by showing that such accommodation would involve "more than a *de minimis* cost". 432 U.S. at 84.

Dissenting in *Hardison*, Justice Marshall characterized the decision as "a fatal blow to all efforts under Title VII to accommodate work requirements to

religious practices." 432 U.S. at 86 (Marshall, J., dissenting). His words, unfortunately, have been proven largely prophetic. As one Circuit Court has noted, "a standard less difficult to satisfy than the '*de minimis*' standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine." *Yott* v. *North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979). In a growing number of cases, lower courts applying *Hardison* -- including this one -- have diluted the protections of Title VII further still, by allowing employers to adduce amorphous non-economic burdens as an "undue hardship" on their business. The net result: a stubbornly persistent pattern of discrimination against Sabbath observers in the workforce.

Agudath Israel believes that, contrary to *Hardison*, hardship ought not be deemed "undue" for purposes of Title VII unless it entails significant difficulty or expense. Indeed, as further developed herein, Agudath Israel believes that *Hardison*'s *de minimis* "more than a *de minimis* cost" standard raises serious constitutional free exercise questions that merit the Court's careful consideration. This case, which so starkly illustrates the weakness of existing Title VII protections for Sabbath observers in the workforce, affords the Court an opportunity to undertake such consideration.

## ARGUMENT

### "UNDUE HARDSHIP" FOR PURPOSES OF TITLE VII SHOULD HAVE THE SAME MEANING "UNDUE HARDSHIP" HAS FOR PURPOSES OF THE ADA

Petitioner's brief, at 15-16, cites a string of cases demonstrating a judicial trend toward what petitioner correctly describes as the "emasculat[ion]" of Title VII's "reasonably high 'undue hardship' standard" in favor of "a much lower 'more than *de minimis* burden' standard." Agudath Israel concurs with petitioner that this trend of judicial emasculation, while purporting to be based on *Hardison*, in fact misapprehends *Hardison*. "Undue hardship," per *Hardison*, means *identifiable economic costs* that are more than *de minimis* -- "costs," in the words of the applicable EEOC regulations, "similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*." 29 C.F.R. §1605.2(e)(1). "Undue hardship" does not mean -- and certainly *ought* not mean, if Title VII's religious accommodation requirement is to have any force -- amorphous non-economic burdens an employer would have to bear in accommodating an employee's religion. For that reason alone, this case -- an egregious example of the trend toward unwarranted extension of *Hardison* -- is worthy of the Court's review.

More fundamentally, however, the time has come for this Court to reconsider its *Hardison* "more than a *de minimis* cost" understanding of the statutory phrase "undue hardship." Not only has the *Hardison* standard, especially as applied (or misapplied) in the lower courts, proven to be insufficiently protective of religious workers; it is simply no

longer tenable as a matter of statutory construction, and may even raise serious questions of constitutional propriety. That is because it conflicts directly with the standard Congress itself established in defining "undue hardship" in the analogous context of the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (ADA) -- thereby creating the constitutionally problematic dichotomy between the low level of statutory protection accorded religious workers who require employment accommodation and the considerably higher level of statutory protection accorded handicapped workers who require employment accommodation.

The ADA, enacted in 1990, makes it unlawful for employers and other "covered entities" to "discriminate" in employment on the basis of an employee's or prospective employee's disability. 42 U.S.C. §12112(a). In language reminiscent of Title VII, the ADA statute defines the term "discriminate" to include:

> "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, *unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity*". 42 U.S.C. §12112(b)(5)(A) [emphasis added].

Unlike Title VII, however, the ADA statute explicitly defines the term "undue hardship". Under the statute, "undue hardship means an action requiring *significant difficulty or expense*" [emphasis added], when

considered in light of certain statutorily enumerated factors relating to the type of accommodation necessary, the facility at which the accommodation is to be made, and the entity required to make the accommodation. 42 U.S.C. §12111(10).

The statutory "significant difficulty or expense" standard governing "undue hardship" defenses under the ADA, by its very terms, imposes on employers a greater obligation than does the *Hardison* "more than a *de minimis* cost" standard governing "undue hardship" defenses under Title VII. Indeed, the legislative history of the ADA makes clear that in enacting protection for disabled employees, Congress was fully cognizant of the *Hardison* standard, considered it inadequate, and expressly defined "undue hardship" as it did to preclude a *Hardison*-like reading of the ADA. Thus, in its report on the ADA, the House Public Works and Transportation Committee took pains to emphasize that:

> "[T]he principles enunciated by the Supreme Court in *TWA* v. *Hardison*... are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under [T]itle VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimis* cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted

> in the statute -- i.e., *a significantly higher standard than that articulated in* Hardison." 1990 U.S.C.C.A.N. 4, Legislative History, at 350 [emphasis added].

If, as *Hardison* teaches, the protections of Title VII are available to religious practitioners in the workforce only if an employer's cost of reasonable accommodation is *de minimis*; and if, as the plain language and explicit legislative history of the ADA teach, the protections of the ADA are available to handicapped persons in the workforce even when the employer's cost of reasonable accommodation is more than *de minimis*, so long as it does not rise to the level of "significant difficulty or expense"; then a stark question is posed: *Why are religious workers afforded less protection under the law than handicapped workers*?

The question is one of constitutional magnitude. Presumably the constitution would not mandate that private employers make any form of accommodation to employees' special needs. However, having independently decided to create its own legislative accommodation mandate through anti-discrimination statutes like Title VII and the ADA, Congress cannot give handicapped workers greater protection than religious workers without implicating First Amendment free exercise concerns. Even *Employment Division, Oregon Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), the controversial case in which the Court severely constricted the scope of constitutional free exercise, acknowledged that where government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship'

without compelling reason." 494 U.S. at 884.

Continued adherence to *Hardison*'s expansive reading of Title VII's "undue hardship" defense -- and its correspondingly niggardly reading of Title VII's reasonable accommodation requirement -- would thus raise serious constitutional concerns. It would also raise problems of statutory construction.

As a general rule, when two statutes have similar purposes -- as they do here; both Title VII and the ADA are designed to protect employees who require accommodations for their special needs in the workforce -- and employ similar language -- again, as they do here; both Title VII and the ADA mandate "reasonable accommodation" and permit an employer to avoid that mandate by showing "undue hardship" -- the two statutes are treated "*in pari materia*", and ambiguities in one are often resolved by reference to the other. *See generally* 2B Sutherland Statutory Construction §51.03 (5th Ed. 1992). As the Court has indicated in an analogous context:

> "Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. [Citation omitted.] We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than

nonsense out of the *corpus juris*."

*West Virginia University Hospitals* v. *Casey*, 499 U.S. 83, 100-01 (1991). Here, of course, this would not be the first time Title VII's ambiguous "undue hardship" clause would be presented to the Court, but the operative principle is the same; in light of Congress' clear interpretation of "undue hardship" in the subsequently enacted ADA, it would make nonsense rather than sense out of the *corpus juris* to interpret Title VII differently than the ADA.

To avoid these constitutional and interpretive problems, Agudath Israel submits, the Court should revisit the Title VII accommodation obligation, and bring it into line with that established by the ADA by requiring an employer claiming "undue hardship" to show that reasonably accommodating an employee's religion would entail "significant difficulty or expense".

Furthermore, just as the ADA instructs that "significant difficulty or expense" is to be determined in light of factors specifically relevant to the disability context, as enumerated in 42 U.S.C. §12111(10)(B), so too would "significant difficulty or expense" be determined for purposes of Title VII in light of factors specifically relevant to the context of religious observance. These factors are already spelled out in existing EEOC guidelines, 29 CFR §1605.2(e), and include: "the identifiable cost [of the accommodation] in relation to the size and operating cost of the employer, and the number of individuals who will in fact need particular accommodation"; and the extent to which the accommodation would require "a variance from a bona fide seniority system" that "would deny another

employee his or her job or shift preference guaranteed by that system."

Elevating the level of protection for religiously observant employees under Title VII as suggested herein would not, in Agudath Israel's view, create independent First Amendment establishment clause problems of the type the Court discerned in *Estate of Thornton* v. *Caldor*, 472 U.S. 703 (1985). The infirmity of the Connecticut law at issue there, which directed employers to permit any employee to take off from work on the employee's chosen day of Sabbath, was its "absolute and unqualified" nature. 472 U.S. at 709. For example, noted the Court, "there is no exception when honoring the dictates of Sabbath observers would cause the employer *substantial economic burdens* or when the employer's compliance would require the imposition of *significant burdens* on other employees required to work in place of the Sabbath observers." 472 U.S. at 709-10 [emphasis added; footnote omitted]. Under Title VII, in contrast, the employer's obligation to provide reasonable accommodation of an employee's religion is by no means "absolute and unqualified" -- even if "undue hardship" is interpreted, as it is under the ADA, to require an employer who seeks to be excused from such accommodation to demonstrate "significant difficulty or expense."

## CONCLUSION

Justice Marshall, dissenting in *Hardison*, bemoaned what he saw as "[t]he ultimate tragedy" of the Court's decision: "D]espite Congress' best efforts, one of this Nation's pillars of strength -- our hospitality to religious diversity -- has been seriously eroded. All Americans will be a little poorer until today's decision is erased." 432 U.S. at 97 (Marshall, J., dissenting).

For the reasons set forth in petitioner's brief, and for the additional reasons set forth herein, Agudath Israel respectfully urges the Court to grant a writ of certiorari and seize the opportunity, eighteen years after Justice Marshall's lament, to erase *Hardison* once and for all and restore the full promise of Title VII.

Respectfully submitted,

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